
Volume 118
Issue 3 *Dickinson Law Review* - Volume 118,
2013-2014

1-1-2014

The Four-Factor Penn Central Regulatory Takings Test

Steven J. Eagle

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

Recommended Citation

Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 DICK. L. REV. 601 (2014).
Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol118/iss3/4>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

The Four-Factor *Penn Central* Regulatory Takings Test

By Steven J. Eagle*

Abstract

This Article examines the ad hoc, multifactor, regulatory takings doctrine derived from *Penn Central Transportation Co. v. City of New York*. It analyzes the conventional three-factor characterization of the *Penn Central* factors, and concludes that a four-factor approach better captures the dynamics of the *Penn Central* analysis. “Parcel as a whole,” conceptually regarded as delimiting the relevant parcel for the *Penn Central* inquiry, in fact interacts with the “economic impact,” “investment-backed expectations,” and “character of the regulation” factors. While the four-factor analysis advocated here is conceptually better and enhances an understanding of how *Penn Central* operates, the doctrine remains under-theorized, subjective, with its factors mutually referential, and unable to provide a reliable guide to courts or litigants.

Table of Contents

I.	INTRODUCTION	602
II.	FROM THE <i>PENN CENTRAL</i> CASE TO THE <i>PENN CENTRAL</i> DOCTRINE.....	605
	A. The <i>Penn Central</i> Case	605
	1. A Cause Célèbre and a Legal Provocation	605
	2. No New Law?	607
	3. Counterfactual Ironies	608
	4. Was the Judgment in <i>Penn Central</i> Correct?	609
	B. The Four <i>Penn Central</i> Factors.....	612
	1. The “ <i>Armstrong</i> Principle” of Fairness	612
	2. <i>Penn Central</i> ’s Three-Factor Inquiry	615
	3. Economic Impact	616
	4. Investment-Backed Expectations	619
	5. Character of the Regulation	621
	6. Parcel as a Whole.....	622

* Professor of Law, George Mason University, Arlington, Virginia (seagle@gmu.edu). The author wishes to thank James R. Conde for his excellent research assistance.

	C. The Recapitulation and Expansion of <i>Penn Central</i> 's Domain ...	624
III.	CRACKS IN THE PTOLEMAIC MODEL	626
	A. "Physical" Versus "Regulatory" Takings	626
	1. An Artificial Distinction	626
	2. Applying the Distinction in Borderline Cases.....	628
	B. The "Relevant Parcel" Problem	631
	1. Identifying the Property Interest	633
	2. The Temporary Investment	633
	3. On Proving Non-Ownership	637
	C. "Permanent" and "Temporary" Regulatory Takings.....	638
	1. Might a "Permanent" Taking Be Temporary?	640
	2. Evaluating the Temporary Taking as Permanent	641
IV.	CONCLUSION	644

I. INTRODUCTION

Since *Penn Central Transportation Co. v. City of New York*¹ was handed down 35 years ago, judges, litigants, municipal officials, and developers have all tried to make sense of its various tests and use them to predict case outcomes. It is possible, however, that *Penn Central* never was intended to expound a set of tests with objective criteria.² Instead, the Supreme Court might have intended to provide some protection to landowners deemed unfairly harmed by changes in land use regulations.

This Article analyzes the principal factors generally thought to comprise the *Penn Central* doctrine. Its main contribution the addition of a fourth factor, which is described in a separate part of *Penn Central* as "parcel as a whole." This Article is not intended to critique the level of protection that *Penn Central* accords property owners. Rather, it explains how the doctrine has become a compilation of moving parts that are neither individually coherent nor collectively compatible.

The U.S. Supreme Court pronounced that the *Penn Central* line of cases³ is the "polestar" of its regulatory takings jurisprudence.⁴ This

1. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

2. For an analysis of the *Penn Central* doctrine primarily as an aspirational guideline akin to substantive due process, see generally Steven J. Eagle, *Penn Central and its Reluctant Muftis*, 66 BAYLOR L. REV. (forthcoming 2014).

3. The principal cases expanding upon *Penn Central* include: *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (finding that "does not substantially advance legitimate state interests" is not a valid takings test, but rather a substantive due process test); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (deciding whether a temporary moratoria on all economic use is a taking that must be evaluated on *Penn Central* factors); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (deciding that a takings claim is not barred by acquisition of title subsequent to the effective date of regulation); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (finding that

Article asserts that a more accurate astronomical analogy to *Penn Central* and its progeny is Ptolemy's geocentric cosmology. The planets display retrograde motions that seem inconsistent with a simple theory of their revolution around the Earth. Ptolemy noticed these motions and accounted for them by superimposing small circles, called "epicycles," on the larger orbits of the heavenly spheres.⁵

The reasoning by which Ptolemy justified his geocentric universe was literally convoluted. "Over time, the epicycles had constantly to be redrawn to account for new and divergent data, but there was an enduring belief that the refinements represented a progressive approach to reality."⁶ Likewise, in the 35 years since *Penn Central* was decided, courts have patched its flaws with increasingly complex tests.⁷

The *Penn Central* doctrine does not have a firm grounding in property law or due process, and can be viewed as a series of cycles. The doctrine itself has progressed through the Supreme Court offering heuristics responsive to particular cases before it. Lower courts, uncomfortable with unbounded discretion, transmuted those heuristics into what were described as objective rules. Subsequently, the Supreme

conditions imposed on an administrative permit not based on an individualized determination of the "rough proportionality" between the conditions and police power burdens resulting from development constitute a taking); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (noting that a complete deprivation of economic use constitutes a taking); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (deeming the imposition of a development permit condition without any nexus to permissible regulatory purposes a taking); *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304 (1987) (ordering that compensation must be paid where regulation constituted a taking for the time during which the taking was effective, despite the government's subsequent withdrawal or invalidation of the regulation then in effect); *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (stating that takings claims against state or local governments are not "ripe" for federal court adjudication without (1) a final decision regarding the type and intensity of development permitted and (2) exhaustion of available state procedures for compensation); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (finding that the public disclosure of trade secrets in violation of a statutory promise of confidentiality constitutes a taking); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (finding that permanent physical occupations constitute per se takings).

4. *Tahoe-Sierra Pres. Council*, 535 U.S. at 336 (quoting "polestar" language approvingly); *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring) ("Our polestar . . . remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings").

5. See FRANK N. BASH, *ASTRONOMY* 356 (1977) (illustrating uses of planetary epicycles).

6. William A. Edmundson, *The Antinomy of Coherence and Determinacy*, 82 IOWA L. REV. 1, 13 (1996).

7. See Lloyd L. Weinreb, *The Exclusionary Rule Redux—Again*, 37 FORDHAM URB. L.J. 873, 873 (2010) (observing "[o]ne would have thought that there has been more than enough time for the Supreme Court to have clarified what the [Fourth Amendment exclusionary] rule is about" instead of "freight[ing it] with innumerable epicycles, and epicycles on epicycles").

Court rejected those rules as too rigid, sometimes offering new heuristics in their place.

The result is the creation of feedback loops that conflate ostensibly objective law with ostensibly subjective expectations about law. Even as he resisted the imposition of a bright-line test in *Lucas v. South Carolina Coastal Council*,⁸ Justice Kennedy observed, “[t]here is an inherent tendency towards circularity in this synthesis, of course; for if the owner’s reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is.”⁹ The result, as noted by District of Columbia Circuit Judge Stephen Williams, is that all except the most abrupt changes in regulations would commensurately affect expectations, so that “regulation begets regulation.”¹⁰

But quite beyond the basic circularity to which Kennedy and Williams referred, each of the principal elements of *Penn Central* depends on the others for content and meaning.¹¹ Furthermore, the complex and ad hoc approach that is at the heart of *Penn Central* has been sharply criticized by scholars as “mask[ing] intellectual bankruptcy,”¹² and as a “strategy of insecurity.”¹³ As noted by the Supreme Court itself, regulation without standards gives officials unchecked discretion.¹⁴

In the most general terms, the *Penn Central* doctrine purports to provide a jurisprudence of takings. In reality, however, it provides a jurisprudence of property deprivations that is built upon neither property rights nor substantive due process. Instead, it conjectures upon claimants’ expectations regarding what they owned, together with inherently subjective notions of fairness.¹⁵

This Article opens by reviewing *Penn Central* and the basic elements of its associated doctrine: economic impact, investment-backed expectations, character of the regulation, and “parcel as a whole.”¹⁶ It

8. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

9. *Id.* at 1034 (Kennedy, J., concurring).

10. *Dist. Intown Props. Ltd. P’ship v. District of Columbia*, 198 F.3d 874, 887 (D.C. Cir. 1999) (Williams, J., concurring).

11. *See infra* Part III.

12. *See, e.g.*, Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 93 (1986) (noting that “a ‘totality of the circumstances’ analysis masks intellectual bankruptcy”).

13. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 349 (1993) (“Like the use of complex multipart tests and similar analytic schemes, to which it is in fact a perfect complement, the rhetoric of balancing is thus a strategy of insecurity.”).

14. *See Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983).

15. *See infra* Part II.B.1.

16. *See infra* Part II.

then considers problems with the *Penn Central* model, including attempts to clarify how its moving parts are affected by the plasticity of “parcel as a whole,”¹⁷ especially as it pertains to temporary takings,¹⁸ and the unsettled distinction between “physical” and “regulatory takings”¹⁹ that, itself, is grounded in a misunderstanding of the nature of property.²⁰

This Article stresses doctrinal problems, but also notes that *Penn Central* and its progeny fail to meet the most basic practical requirement for a legal rule. Specifically, the *Penn Central* doctrine, with its lack of objective criteria, does not impart knowledge of the legal rights and obligations of either property owners²¹ or public officials,²² resulting in protracted litigation and arbitrary outcomes.²³

II. FROM THE *PENN CENTRAL* CASE TO THE *PENN CENTRAL* DOCTRINE

A. *The Penn Central Case*

1. A Cause Célèbre and a Legal Provocation

As Justice Brennan noted, Grand Central Terminal “is one of New York City’s most famous buildings. Opened in 1913, it is regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style.”²⁴ The New York City Landmarks Preservation Commission eventually designated it a “landmark,” which meant that Commission permission was required for alterations of its exterior architectural features or construction of exterior improvements on the terminal site. In 1968, in order to augment its income, Penn

17. See *infra* Part II.B.6.

18. See *infra* Part III.C.

19. See *infra* Part III.A.

20. See *infra* Part III.A.1.

21. See, e.g., Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 679, 681 (2005). Kanner noted that:

Penn Central lacks doctrinal clarity because of its outright refusal to formulate the elements of a regulatory taking cause of action, and because of its intellectual romp through the law of eminent domain that paid scant attention to preexisting legal doctrine. Its aftermath has become an economic paradise for specialized lawyers, a burden on the judiciary, as well as an indirect impediment to would-be home builders, and an economic disaster for would-be home buyers and for society at large.

Id. (footnote omitted).

22. *Id.* at 682–83 (citing Arvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 2 (1970)).

23. See, e.g., William W. Wade, *Penn Central’s Ad Hocery Yields Inconsistent Takings Decisions*, 42 URB. LAW. 549, 549–50 (2010).

24. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 115 (1978).

Central entered into a long-term lease agreement for the construction of a 55-story office building above the terminal. It was undisputed that the building would meet all zoning and building requirements not related to historic preservation.²⁵ Nonetheless, the Commission rejected Penn Central's application for the required certificate of "appropriateness" on the grounds that the project would be "an aesthetic joke."²⁶

The railroad brought suit, and the New York trial court's subsequent unpublished order found that the Commission's actions constituted a compensable taking. The trial court enjoined enforcement and set a future hearing for Penn Central's request for damages.²⁷ After the City's corporation counsel recommended that it accept the railroad's offer to waive damages if the City agreed not to appeal, the Municipal Art Society, a prestigious local organization, started a spectacularly successful public relations campaign that induced the City to fight, and that culminated in numerous celebrities taking a whistlestop train to Washington just before the Supreme Court heard oral argument.²⁸

According to later recollections of Penn Central's attorney, Daniel Gribbon, the railroad sought certiorari because Chief Judge Charles Breitel's opinion below for the New York Court of Appeals²⁹ "broke new ground."³⁰

He had come up with a theory that in a matter of a taking you are entitled only to the value that you privately had added to the piece of property and are not entitled to the value that the public had added either by location or taxing or something of that sort. And, in addition, he had concluded that in the takings area the landmark designation program was so socially and culturally beneficial to the public that instead of being entitled to just compensation you were entitled only to any compensation that was necessary if you were unable to make a profit from the property that you had left. That seemed to us to be wrong in both respects and it was for that reason that we filed a petition for a writ.³¹

Mr. Gribbon's description is accurate. According to Chief Judge Breitel's opinion, in examining the reasonable rate of return that property

25. *Id.* at 115-18.

26. *Id.* at 117-18.

27. *See* Penn Cent. Transp. Co. v. City of New York, 377 N.Y.S.2d 20, 20 (App. Div. 1975) (noting the unpublished order of the Supreme Court, New York County, Irving H. Saypol, J.).

28. RICHARD F. BABCOCK & CHARLES L. SIEMON, *THE ZONING GAME REVISITED* 4-5 (1985).

29. Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978).

30. Transcript, *Looking Back on Penn Central: A Panel Discussion With the Supreme Court Litigators*, 15 FORDHAM ENVTL. L. REV. 287, 288 (2004) (remarks of Daniel Gribbon, Esq.).

31. *Id.* at 288-89.

owners are due, courts must subtract “that ingredient of property value created not so much by the efforts of the property owner, but instead by the accumulated indirect social and direct governmental investment in the physical property, its functions, and its surroundings.”³² This Georgist view of property rights was a remarkable assertion that government was “entitled to appropriate to itself all of the advantages of civilization.”³³

2. No New Law?

David Carpenter, who was Justice Brennan’s law clerk when *Penn Central* was handed down, later related that “other clerks had told me that the opinion better not say very much before I started work on the draft and in fact after it was circulated, Justice Stewart’s clerk read it and said he was pretty sure it doesn’t say anything at all. [Laughter].”³⁴ Of course, the lack of immediate notoriety is not definitive. For instance, at the time *United States v. Carolene Products Co.*³⁵ was decided, it “attracted virtually no public attention.”³⁶ Later, Justice Frankfurter disparagingly noted that “[a] footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine”³⁷

Perhaps Buzz Thompson, now a law professor at Stanford and, during the Court’s consideration of *Penn Central*, a law clerk to then-Justice Rehnquist, had a more discerning take on the case:

The question, again, is whether I am surprised by the lasting impact of the dissent, right? [Laughter] No, I’m not surprised that the majority opinion has had lasting significance. I actually think that it’s an amazingly well crafted majority opinion, and its staying power is the result of two things. The first is that it does say something. It could have been an opinion that was five pages long, cited a couple of cases in support, and said we rule in favor of New York City. But it didn’t. It went on to lay out a balancing test and to try to give some sense of what goes into that balancing test. And yet at the same time,

32. *Penn Cent.*, 366 N.E.2d at 1272–73.

33. WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 50 (1995). For explication that Chief Judge Breitel’s opinion was based on the philosophy of Henry George, see Steven J. Eagle, *Public Use in the Dirigiste Tradition: Private and Public Benefit in an Era of Agglomeration*, 38 *FORDHAM URB. L.J.* 1023, 1070–72 (2011).

34. Transcript, *supra* note 30, at 307–08 (remarks of David Carpenter, Esq.).

35. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (announcing the need for heightened judicial scrutiny of government actions evidencing, for instance, “prejudice against discrete and insular minorities”).

36. Aviam Soifer, *On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition*, 48 *WASH. & LEE L. REV.* 381, 388 (1991).

37. *Kovacs v. Cooper*, 336 U.S. 77, 90–91 (1949) (Frankfurter, J., concurring).

because it was written to try to hold together a majority, it sets out a test which is appealing to a large number of judges. And so it's not at all surprising that as courts have wrestled with takings issues and found them as difficult as they are, they frequently find themselves coming back to *Penn Central* which appears to offer a refuge for virtually everyone—and in the process maybe doesn't say anything at all.³⁸

3. Counterfactual Ironies

Given that *Penn Central* emphasized the need for fact-specific analysis, it is interesting to note that important parts of the opinion are based on incorrect factual assumptions that resulted from tactical decisions by counsel or, perhaps, from bad lawyering.

First, as the case mentioned in passing, there certainly were investment-backed expectations in the construction of an office tower on top of Grand Central Terminal, proved by the fact that “[t]he Terminal’s present foundation includes columns, which were built into it for the express purpose of supporting the proposed 20-story tower.”³⁹ Unfortunately for the railroad, it ran afoul of what the Supreme Court subsequently elaborated as the “final decision” and “use of available state procedures” prongs of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*⁴⁰ by not “avail[ing] themselves of the opportunity to develop and submit other plans”⁴¹ and by not seeking judicial review of the Commission’s denial of the 55-story development applications.⁴² Instead, “Appellants sought a declaratory judgment, [along with] injunctive relief barring the city from using the Landmarks Law to impede the construction of any structure that might otherwise lawfully be constructed on the Terminal site”⁴³

Also, *Penn Central* did not own the relevant part of what the Court termed its “parcel as a whole,” having entered into a long-term lease of the air rights above the terminal in 1968 with UGP Properties, Inc., which was to construct the office building.⁴⁴ The takings lawsuit might

38. Transcript, *supra* note 30, at 308 (emphasis added) (remarks of Professor Barton H. “Buzz” Thompson, Jr.).

39. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 115 n.15 (1978).

40. *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (finding that takings claims against state or local governments are not “ripe” for federal court adjudication without (1) a final decision regarding the type and intensity of development permitted and (2) exhaustion of available state procedures for compensation).

41. *Penn Cent.*, 438 U.S. at 118–19.

42. *Id.* at 118.

43. *Id.* at 119.

44. *Id.* at 116, 131.

have been more successful had the plaintiff been UGP, and had the action involved only its air rights. The railroad's attorney, Daniel Gribbon, later stated that he thought he made a "mistake . . . in not arguing the notion that air rights are a very important and discrete part of a property interest."⁴⁵ He added that while today air rights are "well established," 25 years earlier they were "sort of mysterious" and, according to the New York Court of Appeals at that time, "really [didn't] amount to very much."⁴⁶ Gribbon further stated, "[H]ad I been able to persuade the lawyers on the Court that these air rights were just as important a part of property as an acre of ground or a wing of a building the decision could possibly have been different."⁴⁷

Another problem was Penn Central's failure to challenge the New York courts' determination that "Penn Central could earn a 'reasonable return' on its investment in the Terminal."⁴⁸ As economist William Wade noted:

The decision overlooks diminished investors' expectations about the growth of the whole business in relation to expectations about the income from the fifty-five-story building development above the terminal. The relative importance of this new income compared to the declining income of the rails business was the single-most salient stick to evaluate. This stick, doubtless, would have become the tree trunk for the future Penn Central enterprise Penn Central rail stock was taken over by the federal government in 1975-76 to operate as Conrail. The terminal operation was taken over by New York City's Metropolitan Transit Authority in 1983 in a state of disarray. The historic facts demonstrate that the plaintiffs faced a fatal hardship that was unrecognized by the New York Appellate and Supreme Courts, which ultimately resulted in slow decay and confiscation that can be dated back *ab initio*.⁴⁹

4. Was the Judgment in *Penn Central* Correct?

It is possible to examine the correctness of the *Penn Central* judgment upholding the New York City historic preservation ordinance apart from the case's doctrinal analysis. Even supporters of stringent government regulation of property who find *Penn Central*'s tests problematic might support its result. For instance, Professor John Echeverria would consign the *Penn Central* doctrine to "history's

45. Transcript, *supra* note 30, at 306 (remarks of Daniel Gribbon, Esq.).

46. *Id.*

47. *Id.*

48. *Penn Cent.*, 438 U.S. at 129 n.26.

49. William W. Wade, *Penn Central's Economic Failings Confounded Takings Jurisprudence*, 31 URB. LAW. 277, 284-85 (1999) (footnotes omitted).

dustbin”⁵⁰ because it lacks clarity and has never produced a landowner victory in the Supreme Court unless “some special factor” was present, such as deprivation of all value or physical occupation.⁵¹ Nevertheless, Professor Echeverria has made clear that, while “toss[ing] out the *Penn Central* bath water,” he would “preserve the *Penn Central* baby.”⁵²

Echeverria’s affirmative views derive from *Penn Central*’s recognition that measuring the impact of a regulation on “the claimant’s entire parcel of property” is important, that diminutions in value, alone, cannot constitute a taking, that transferable development rights (“TDRs”) can “help offset the economic burden” of a regulation, and that land use restrictions might affirmatively add to owners’ property values.⁵³ A brief response would stress that these four points do not permit us to depart from his acknowledged infirmity of the *Penn Central* test as much as Echeverria might think. His invocation of “parcel as a whole” expressed in terms of an “entire parcel of property” highlights the incorrect conflation of “property” with physical parameters and the right of exclusion.⁵⁴ It is correct, speaking loosely, that a diminution in value alone cannot constitute a taking, but such an equation conflates “value” with “property.”⁵⁵

Penn Central stated that TDRs “undoubtedly mitigate whatever financial burdens the law has imposed on appellants[,]” thus reducing the possibility that the regulation would be deemed a taking, and further avoiding the conclusion that they otherwise could constitute inadequate compensation.⁵⁶ Therefore, the grant of a TDR benefits the recipient, but at the cost of depriving other landowners of rights. If increased development in the neighborhood in which TDRs may be used should be

50. John D. Echeverria, *Is the Penn Central Three-Factor Test Ready for History’s Dustbin?*, 52 LAND USE L. & ZONING DIG., Jan. 2000, at 3.

51. *Id.* at 4 (citing, inter alia, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (deprivation of all economic use); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (physical occupation)). For one recent case to the contrary, see *City of Sherman v. Wayne*, 266 S.W.3d 34, 44–50 (Tex. App. 2008), where the court upheld the trial court’s finding of a *Lucas* taking based on a zoning ordinance’s deprivation of all economically viable use and the jury’s condemnation award, and ordered the land to be deeded to the city.

52. Echeverria, *supra* note 50, at 3.

53. *Id.* at 3–4.

54. See *infra* Part II.B.6.

55. If an owner’s “value” were derived from the advantage gained from dumping cyanide into the stream behind a parcel, a regulatory prohibition would be based on the fact that, under the common law, no right to engage in that activity “inhere[d] in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.” *Lucas*, 505 U.S. at 1029. Thus, the regulation would be viewed through the lens of the police power. See *Mugler v. Kansas*, 123 U.S. 623, 675 (1887) (upholding prohibition rendering brewery useless).

56. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 137 (1978).

permitted, it should redound to the benefit of the existing landowners in that neighborhood, who had been deprived of value by regulation that turns out to be overly restrictive.⁵⁷

Moreover, restrictions indeed *can* add to property values where there is true reciprocity of advantage.⁵⁸ However, *Penn Central* is an archetypical case where that concept was abused. It was abused both by the arrogation of the benefit of diffused social interactions to government by the New York Court of Appeals, and by the lopsided view of “reciprocity” adopted by the Supreme Court’s majority, described in then-Justice Rehnquist’s dissent.⁵⁹

It is entirely possible that a contemporary state court would hold *Penn Central* unripe for adjudication by borrowing the federal *Williamson County* “final decision” rule.⁶⁰ For instance, the New York Court of Appeals has held that a regulatory takings claim is not ripe for judicial review until “the governmental entity charged with implementing the regulations has rendered a final decision regarding the application of the regulations to the property,” and “alternative uses of the property have been considered and rejected[.]”⁶¹ As noted earlier, an application for an office tower smaller than 55 stories never was made, so that, even if the air rights were deemed the relevant parcel, it never was established how much development of those rights was allowed.

The Supreme Court subsequently reduced the scope and importance of *Penn Central* by adopting two bright-line rules. In 1982, it held that a permanent physical occupation would constitute a per se taking in *Loretto v. Teleprompter Manhattan CATV Corp.*⁶² Similarly, in 1992, it held a deprivation of “all economically viable use” to constitute a per se taking in *Lucas v. South Carolina Coastal Council*.⁶³ While bright-line

57. See *Barancik v. Cnty. of Marin*, 872 F.2d 834, 837 (9th Cir. 1988) (holding enhanced development rights should be shared by owners in the targeted area).

58. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). There, Justice Holmes famously used the phrase “average reciprocity of advantage” to refer to regulations that impose burdens on individual property owners, but provide them with corresponding benefits by imposing the same burdens on others. *Id.* More recent cases are premised on the same principle. See, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297, 304–05 (1976) (upholding French Quarter preservation ordinance).

59. *Penn Cent.*, 438 U.S. at 138 (Rehnquist, J., dissenting) (“Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks.”).

60. *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 186–94 (1985).

61. *Town of Orangetown v. Magee*, 665 N.E.2d 1061, 1066 (N.Y. 1996) (citing *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 96, 102 (2d Cir. 1992)).

62. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

63. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030–32 (1992).

rules appeal to both conservatives and liberals,⁶⁴ subsequent cases relegated *Loretto* and *Lucas* to their archetypical facts.⁶⁵

B. *The Four Penn Central Factors*

This Part analyzes the *Penn Central* regulatory takings test to include the three traditional *Penn Central* factors, plus the *Penn Central* “parcel as a whole” rule. “Parcel as a whole” has a much greater role than merely specifying the physical boundaries of a deeded parcel of land as an arena in which the three factors play out. It is, rather, a fourth factor that helps shape the meaning of each of the other three. This is perhaps most clear in the temporary takings context, where that form of taking might be defined out of existence.⁶⁶

This Part will also discuss the principle of fairness pervasive in the *Penn Central* doctrine. Rather than comprising an empty rhetorical trope, fairness has substantive effects on the takings factors.⁶⁷ For this reason, it is discussed prior to the four factors.

1. The “*Armstrong* Principle” of Fairness

In *Penn Central*, Justice Brennan quoted *Armstrong v. United States*, which declared that the “‘Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” Justice Brennan added that the Supreme Court “has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”⁶⁸ In *Tahoe-Sierra Preservation Council*,

64. See, e.g., John D. Echeverria, *Making Sense of Penn Central*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10471, 10471–72 (2009) (noting that such an approach might lead “reliably to findings of takings liability, albeit in narrowly defined circumstances[.]” appealing to property rights advocates, and might “identify[] actions that would be safely immune from takings liability[.]” appealing to those favoring regulation).

65. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005) (limiting *Lucas* to regulations depriving an owner of “‘all economically beneficial us[e]’” (alteration in original) (quoting *Lucas*, 505 U.S. at 1019)); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 324 (2002) (limiting *Loretto* to “relatively rare, easily identified” circumstances).

66. See *infra* Part III.C.

67. See *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120–23 (9th Cir. 2010) (en banc) (combining the expectations factor with basic considerations of fairness to deny compensation), *cert. denied*, 131 S. Ct. 2455 (2011).

68. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123–24 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Inc. v. Tahoe Regional Planning Agency,⁶⁹ the Supreme Court for the first time referred to the “*Armstrong* principle.”⁷⁰ Three years later, the Supreme Court’s summation of its takings jurisprudence in *Lingle v. Chevron U.S.A. Inc.*⁷¹ reiterated its preference for *Armstrong* without indicating a rationale.⁷²

While the salutary nature of the *Armstrong* principle seems self-evident, *Penn Central* and *Lingle* might have referred as well to fundamental values that underlay the compensation requirement with more particularity. These values include the roles of just compensation in preventing wasteful and excessive government, by ensuring that property taken is worth more to the government than it is in the marketplace; and in protecting individual liberty, by placing a check on a government’s ability to squelch opposition by taking the land of political opponents.⁷³

The requirement for just compensation (together with the Public Use Clause of the U.S. Constitution)⁷⁴ also imposes some restraint on a correlative device—crony capitalism—where officials use the promise of re-conveying appropriated lands to reward their friends.⁷⁵ Most generally, the ownership of property gives individuals the security in their homes and businesses that provides the sense of independence necessary for free citizens in a democratic polity.

While the decline of substantive due process led courts away from vigorous enforcement of property rights,⁷⁶ courts are sometimes uncomfortable with the outer limits of legislative and regulatory deference. Limiting scrutiny to arbitrary or capricious regulations under a deferential view of the Due Process Clause seems odd when

69. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002).

70. *Id.* at 321.

71. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

72. *Id.* at 537 (“While scholars have offered various justification for [the Takings Clause], we have emphasized its role in ‘bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” (second alteration in original) (quoting *Armstrong*, 364 U.S. at 49)).

73. Such abuse is not a recent innovation. See, e.g., Iian D. Jablon, Note, *Civil Forfeiture: A Modern Perspective on Roman Custom*, 72 S. CAL. L. REV. 247, 255 (1998) (discussing the systematic use of forfeiture in Rome, starting in 80 B.C., whereby General (later dictator) Lucius Cornelius Sulla “made ‘proscription’ lists of political opponents with substantial resources and confiscated their estates through summary proceedings”).

74. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

75. See, e.g., Eagle, *supra* note 33, at 1080–81 (discussing cronyism in condemnation for urban revitalization).

76. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397–98 (1937); *Nebbia v. New York*, 291 U.S. 502, 510 (1934).

constitutional guarantees explicitly incorporate protections of property and contract. Moreover, the Takings Clause insulates property with an extra layer of protection because, as a constitutional restriction on government, it is self-executing in nature⁷⁷ and not reliant on waiver of sovereign immunity, as would be, for instance, tort claims.⁷⁸ The Takings Clause thus presents a useful judicial vehicle to curtail abuses of governmental power.

However, a jurisprudence of inverse condemnation based on open-ended assessments of regulation under the rubric of “fairness,” instead of property rights, encourages courts to view individual holdings not as aspects of the objective rights of independent citizens, but as adjuncts of relationships within society.⁷⁹ Thus, it inextricably treats the legal rights of individuals as colored by their status.⁸⁰ Indeed, the status of “speculator” played an important role in Professor Frank Michelman’s seminal takings article *Property, Utility, and Fairness: Comments on the Ethical Foundation of “Just Compensation” Law*,⁸¹ and in *Penn Central* itself.⁸²

The Supreme Court’s emphasis on “fairness,” “public burdens,” and “disproportionality” leads to ends-means analyses, which are emblematic of substantive due process.⁸³ This is quite different in tenor from the language of the Takings Clause, which emphasizes that “nor shall private property be taken . . . without just compensation.”⁸⁴ There, all of the emphasis is on the “property,” with none on the owner.

77. See *United States v. Clarke*, 445 U.S. 253, 257 (1980) (holding that a landowner is entitled to bring an action for inverse condemnation “as a result of ‘the self-executing character of the constitutional provision with respect to compensation’” (omission in original) (quoting 6 P. NICHOLS, *EMINENT DOMAIN* § 25.41 (3d rev. ed. 1972))).

78. See, e.g., *United States v. Orleans*, 425 U.S. 807, 813 (1976) (noting that “[t]he Federal Tort Claims Act is a limited waiver of sovereign immunity”).

79. This was the problem with Chief Judge Breitel’s opinion in *Penn Central Transportation Co. v. City of New York*, 366 N.E.2d 1271 (N.Y. 1977), *aff’d*, 438 U.S. 104 (1978). See *supra* notes 29–33 and accompanying text.

80. *Contra* HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 170 (Cambridge Univ. Press 2012) (1861) (“[T]he movement of the progressive societies has hitherto been a movement from *Status* to *Contract*.”).

81. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1237–38 (1967) (asserting that it would be “wholly appropriate” to deny compensation to landowners whose purchase price reflected market awareness of possible future development restrictions); see also Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, 27 URB. LAW. 215, 244 n.117 (1995) (referring to “Professor Michelman’s speculator exception to the investment-backed expectations taking factor”).

82. See *infra* notes 111–12 and accompanying text.

83. See generally Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899.

84. U.S. CONST. amend. V.

2. *Penn Central*'s Three-Factor Inquiry

In a few sentences, the Supreme Court in *Penn Central* sketched what conventionally became known as its three-factor test:

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.⁸⁵

Of course, there is nothing magical about this three-factor inquiry. Perhaps it was attributable to current fashion.⁸⁶ In fact, "it is far from obvious that [the case] actually intended this enumeration of 'significant' factors to define a determinative, free-standing test for a regulatory taking."⁸⁷

[T]o the extent that the Court in *Penn Central* identified discrete factors for consideration, it identified two, rather than three, such factors: (1) the impact of the challenged regulation on the claimant, viewed in light of the claimant's investment-backed expectations and (2) the character of the governmental action, viewed in light of the principle that actions that closely resemble direct exercises of eminent domain are more likely to be compensable takings than are garden-variety land use regulations. Someone who knew nothing of modern takings law would be, to say the least, hard pressed to distill a discrete three-factor analysis from the opinion in *Penn Central*.⁸⁸

The Supreme Court of California enumerated the three *Penn Central* factors plus an additional ten in *Kavanau v. Santa Monica Rent Control Board*.⁸⁹ It further stated:

85. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (citations omitted).

86. See Thomas W. Merrill, *The Character of the Governmental Action*, 36 VT. L. REV. 649, 655 (2012) (asserting with respect to *Penn Central* that "the intellectual fashions of the day demanded three- and four-part tests").

87. Echeverria, *supra* note 50, at 4.

88. Gary Lawson, Katharine Ferguson & Guillermo A. Montero, "Oh Lord, Please Don't Let Me Be Misunderstood!": *Rediscovering the Matthews v. Eldridge and Penn Central Frameworks*, 81 NOTRE DAME L. REV. 1, 32 (2005).

89. *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 860 (Cal. 1997).

This list is *not a comprehensive enumeration* of all the factors that might be relevant to a takings claim, and *we do not propose a single analytical method* for these claims. Rather, we simply note factors the high court has found relevant in particular cases. Thus, instead of applying these factors mechanically, checking them off as it proceeds, a court should apply them as appropriate to the facts of the case it is considering.⁹⁰

Finally, the Supreme Court's assertion that *Penn Central* is about making "essentially ad hoc, factual inquiries" contradicts the notion that the Court would be imposing a rigid set of determinative factors that relate to the underlying factual and legal background, and to each other, in some undisclosed fashion. Nevertheless, the Supreme Court's post-*Penn Central* cases make ample mention of the "three-factor" test,⁹¹ as have many lower court opinions.⁹²

3. Economic Impact

The Supreme Court stated in *Penn Central* that "[t]he economic impact of the regulation . . . and[, in particular], the extent to which the regulation has interfered with distinct investment-backed expectations"

Subsequent cases, as well as a close reading of *Penn Central*, indicate other relevant factors: (1) whether the regulation "interfere[s] with interests that [are] sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes"; (2) whether the regulation affects the existing or traditional use of the property and thus interferes with the property owner's "primary expectation"; (3) "the nature of the State's interest in the regulation" and, particularly, whether the regulation is "reasonably necessary to the effectuation of a substantial public purpose"; (4) whether the property owner's holding is limited to the specific interest the regulation abrogates or is broader; (5) whether the government is acquiring "resources to permit or facilitate uniquely public functions" such as government's "entrepreneurial operations"; (6) whether the regulation "permit[s] the property owner] . . . to profit [and] . . . to obtain a 'reasonable return' on . . . investment"; (7) whether the regulation provides the property owner benefits or rights that "mitigate whatever financial burdens the law has imposed"; (8) whether the regulation "prevent[s] the best use of [the] land"; (9) whether the regulation "extinguish[es] a fundamental attribute of ownership"; and (10) whether the government is demanding the property as a condition for the granting of a permit.

Id. (alterations in original) (citations omitted).

90. *Id.* (emphasis added).

91. See, e.g., *E. Enters. v. Apfel*, 524 U.S. 498, 518 (1998) ("The court analyzed Eastern's claim . . . under the three factors"); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224–25 (1986) (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), and enumerating factors).

92. See, e.g., *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359, 1362 (Fed. Cir. 2009) ("*Penn Central* considered and balanced three factors[.]").

“have particular significance” in the takings determination.⁹³ While “investment-backed expectations” might logically be considered a subset of the “economic impact” factor, the Court subsequently added that such expectations were to be treated as a separate *Penn Central* factor.⁹⁴

“Economic impact” relates to value, but “value” and “property” are very different constructs. “Property” is something susceptible of ownership, while “value” is a measure of how much a person is willing to exchange for that ownership. The Fifth Amendment to the U.S. Constitution protects “private property,” not “economic value.”⁹⁵ Yet, takings of property resulting in losses of purely personal subjective value are not compensated.⁹⁶ Based on the Supreme Court’s explicitly utilitarian analysis, other takings are compensated only to the extent that “a willing buyer would pay in cash to a willing seller[.]”⁹⁷ While the extent of the pecuniary loss occasioned by the taking of property determines the amount of just compensation, the size of the loss should not determine if there is a taking. Because landowners do not have a property right in maintaining a nuisance or other condition inimical to the public health, safety, or welfare, even a large loss resulting from termination of such activity is not compensable.⁹⁸

Given the foregoing, why did *Penn Central* integrate into a takings test economic considerations and, in particular, the economic impact of a regulation? The answer apparently is that an economic effects test is helpful in assessing whether regulatory burdens, in fairness, require just compensation. However, it is unclear what burdens can be considered under the economic impact factor. Justice Brennan in *Penn Central* focused on whether *Penn Central* was allowed a “reasonable return” on

93. *Penn Cent.*, 438 U.S. at 124.

94. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

95. U.S. CONST. amend. V (“[N]or shall *private property* be taken for public use, without just compensation.” (emphasis added)).

96. See *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 239–40 (2003) (finding that the commandeering of money belonging to clients for deposit in “interest on lawyers’ trust accounts” was not a taking because clients could not have realized economic gain otherwise).

97. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)).

Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule. The Court therefore has employed the concept of fair market value to determine the condemnee’s loss. Under this standard, the owner is entitled to receive “what a willing buyer would pay in cash to a willing seller” at the time of the taking.

Id. (citations omitted) (quoting *Miller*, 317 U.S. at 374).

98. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1064 (1992) (declaring “[w]e have frequently . . . held that, in some circumstances, a law that renders property valueless may nonetheless not constitute a taking[.]” and citing cases).

its investment.⁹⁹ Subsequently, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,¹⁰⁰ the Court discussed the regulatory impact of state legislation on a coal company under the rubric of profitability.¹⁰¹ While the “reasonable return” displays the interaction between economic impact and investment-backed expectations, there is no consensus on how this interaction should affect the valuation of regulatory burdens in practice. With little guidance from the Supreme Court, courts have struggled to value regulatory burdens when considering losses of income producing property in temporary takings.¹⁰²

Recently, the Supreme Court stated that the “common touchstone” of its regulatory takings tests is that they “aim[] to identify regulatory actions that are functionally equivalent” to a government appropriation and ouster.¹⁰³ An economic impact test advances this inquiry by providing a rough measure of harm. Because the analogy between a regulation depriving a property owner of use, exclusion, or transfer rights and a formal condemnation of a property interest is not straightforward, an “economic impact” test is useful as a coarse screen for distinguishing many clear-cut takings. Since “economic impact” is also measured with respect to the relevant parcel, these concepts are inextricably intertwined in important takings questions, such as the extent to which losses regarding temporary investments constitute takings.¹⁰⁴

Dean William Treanor argued that, from a historical standpoint, the Takings Clause did not originally encompass regulatory interferences with the value of property rights, but applied only to those situations in which the taking resulted in an actual ouster by the government.¹⁰⁵ Nonetheless, “economic impact” is not justified by its long-standing history (the same holds true for the *Penn Central* doctrine as a whole) but rather by its practicality, because an approach equating “ouster” with

99. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129 n.26 (1978).

100. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

101. *Id.* at 496.

102. *See, e.g., Walcek v. United States*, 49 Fed. Cl. 248, 266 (2001) (rejecting the government's claim that economic impact is limited to diminution in value tests and holding that “[t]he comparative value of the [p]roperty . . . is not the sole indic[um] of the economic impact of the regulation”), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002). *See generally* Steven J. Eagle, “Economic Impact” in *Regulatory Takings Law*, 19 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 407, 416–35 (2013).

103. *Lingle v. Chevron*, 544 U.S. 528, 539 (2005); *see also infra* Part II.C.

104. *See infra* Part III.B.2.

105. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 807 (1995) (“Prior to Justice Holmes’ exposition in *Pennsylvania Coal v. Mahon* . . . it was generally thought that the Takings Clause reached only a ‘direct appropriation’ of property, *Legal Tender Cases*, . . . or the functional equivalent of a ‘practical ouster of [the owner’s] possession.’” (alteration and omission in original) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992))).

“appropriation” fails to explain why an appropriation could not occur without physical ouster.¹⁰⁶ In addition, the growing importance of non-possessory interests has mooted a jurisprudence of takings based on notions of appropriation.¹⁰⁷

4. Investment-Backed Expectations

Penn Central stated that the “economic impact of [a] regulation on [a] claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are” relevant to the takings inquiry.¹⁰⁸ Justice Brennan cited *Pennsylvania Coal Co. v. Mahon*¹⁰⁹ as “the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a ‘taking.’”¹¹⁰ He also cited Professor Frank Michelman’s classic article in which the phrase originated,¹¹¹ and from which Justice Brennan apparently borrowed it.¹¹²

In placing emphasis on expectations, Professor Michelman was concerned with fairness and reliance.¹¹³ However, insistence upon a “sharply crystallized, investment-backed expectation”¹¹⁴ belies the fact that many speculators or developers buy land near the path of urban development, deferring the exact form of its commercial development for a more propitious moment. Furthermore, it is not clear why, under Michelman’s reasoning, unexpected inheritances that unquestionably are windfalls cannot be taken by the state without compensation.¹¹⁵

106. See discussion *infra* Part III.A.1.

107. See WILLIAM B. STOEBUCK, NONTRESSPASSORY TAKINGS IN EMINENT DOMAIN 17–18 (1977) (“As with the concept of ‘property,’ the courts have increasingly moved from a physical toward a nonphysical notion of ‘taking.’”).

108. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

109. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

110. *Penn Cent.*, 438 U.S. at 127.

111. *Id.* at 128 (citing Michelman, *supra* note 81, at 1229–34) (asking whether a given regulation “can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation”).

112. Justice Brennan’s judicial clerk who worked on *Penn Central* much later observed that “[t]he concept of ‘investment backed expectations’ definitely came from Michelman’s article.” Transcript, *supra* note 30, at 309 (remarks of David Carpenter, Esq.).

113. Michelman, *supra* note 81, at 1234.

The zoned-out apartment house owner no longer has the apartment investment he depended on, whereas the nearby land speculator who is unable to show that he has yet formed any specific plans for his vacant land still has a package of possibilities with its value, though lessened, still unspecified—which is what he had before.
Id.

114. *Id.* at 1233.

115. One type of windfall, punitive damage awards, is often appropriated through taxation. There, however, punitive damages have not, *ab initio*, been viewed as a property right. See generally, e.g., *Evans v. State*, 56 P.3d 1046 (Alaska 2002)

It is further not clear whether Justice Brennan intended the "investment-backed" phrase to have precedential value, or whether the phrase was adopted as a rhetorical device to adorn the "economic impact" factor.¹¹⁶ As noted earlier, a natural reading of the relevant text fairly discerns only two factors.¹¹⁷ Moreover, just three years after *Penn Central*, Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego* mentioned "the economic impact" and "character of the regulation" as the *Penn Central* factors, but notably omitted any discussion of "expectations."¹¹⁸

In any event, the intimate association of individual owners' subjective reliance and the sharp pang of loss that seems to be the focus of Michelman and Justice Brennan diffused shortly thereafter in *Kaiser Aetna v. United States*.¹¹⁹ There, without any explanation, then-Justice Rehnquist referred to "reasonable investment-backed expectations,"¹²⁰ an objective formulation apparently based on the state of the law at the time the expectations were formed. If it is unclear whether *Kaiser Aetna* meant to change the expectations test from subjective to objective, it is doubly unclear whether Justice Rehnquist meant to change it from subjective to subjective *and* objective. Regardless, both subjective and objective expectations appear instantiated in current law.

Moreover, in *Good v. United States*,¹²¹ where the owner acquired certain wetlands at a time when development was legally permissible, the U.S. Court of Appeals for the Federal Circuit held: "In view of the *regulatory climate* that existed when Appellant acquired the subject property, Appellant could not have had a reasonable expectation that he would obtain [development] approval . . ."¹²²

Thus, claimants must show that their "expectations," in light of the law and perhaps even legal trends, are both subjectively held and objectively reasonable. Thirty-five years after *Penn Central*, there still has been no satisfactory rejoinder to Professor Richard Epstein's conclusion that "[n]either [Justice Brennan] nor anyone else offers any telling explanation of why this tantalizing notion of expectations is

(upholding statute as limiting punitive damages before vesting); *Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003) (holding that there is no common law property right in damages in excess of those awarded to make plaintiff whole).

116. Kanner, *supra* note 21, at 767–80.

117. See discussion *supra* Part II.B.2.

118. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 648 (1981) (Brennan, J., dissenting).

119. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

120. *Id.* at 175 (emphasis added).

121. *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999).

122. *Id.* at 1361–62 (emphasis added).

preferable to the words ‘private property’”¹²³ However, it is indeed possible for courts to devise property-based rules that eliminate the need for “expectations” analysis, and also deal with the “relevant parcel” problem, at least in the form of safe-harbor rules that might set objective standards for defining the parcel in many cases.¹²⁴

5. Character of the Regulation

One of the factors that *Penn Central* found of “particular significance” was “the character of the governmental action. A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”¹²⁵ Four years after *Penn Central* was decided, the Supreme Court removed permanent physical invasions from *Penn Central*’s purview when it held in *Loretto v. Teleprompter Manhattan CATV Corp.* that such occupations were per se takings.¹²⁶ This raises the issue of what type of “character” would militate in favor of a regulation being considered a taking.

Regulations that are arbitrary or capricious should be struck down as violative of due process.¹²⁷ On the other hand, regulations emphatically serving the common good might nevertheless require compensation, because, as Justice Kennedy noted, the Takings Clause “operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional[.]”¹²⁸

Now that *Loretto* has removed the paradigmatic case of the physical invasion from the ambit of the “character of the regulation” prong, it is unclear what government actions would be of such a character as to

123. Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1370 (1993).

124. See STEVEN J. EAGLE, REGULATORY TAKINGS § 7-7(e)(5) (5th ed. 2012) (advocating a “commercial unit” test, borrowing the term from U.C.C. § 2-608(1)); John E. Fee, Comment, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535, 1563 (1994) (advocating a horizontal parcel of “independent economic viability”).

125. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (citing *United States v. Causby*, 328 U.S. 256 (1946), as an example of a case in which there was a physical invasion).

126. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

127. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005) (“[I]f a government action is found to be impermissible—for instance because it . . . is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.”).

128. *E. Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part).

militate in favor of a regulatory taking. An obvious choice is the regulation that targets specific property.¹²⁹ Another possibility might be condemnation furthering the government's own commercial interests.¹³⁰ A third possibility, suggested in more attenuated fashion, is that a series of ostensibly separate regulatory actions that imposes foreseeable harm on specific property for the single purpose of benefitting other specific property thereby acquires a unity of duration, making the actions more susceptible to be considered a regulatory taking.¹³¹

6. Parcel as a Whole

"Parcel as a whole" has not conventionally been treated as a *Penn Central* factor, but should be one, because of its intrinsic importance in applying the three-factor test. *Penn Central* observed:

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."¹³²

129. See, e.g., *E. Enters.*, 524 U.S. at 543 ("The Coal Act neither targets a specific property interest nor depends upon any particular property for the operation of its statutory mechanisms."); *Arctic King Fisheries, Inc. v. United States*, 59 Fed. Cl. 360, 381 (2004) (noting that "the Supreme Court, in *Eastern Enterprises*, suggested that in considering whether, under this factor, a regulation 'implicates [the] fundamental principles of fairness underlying the Takings Clause,' two other indicia are relevant: (i) the extent to which the action is retroactive; and (ii) whether the action targets a particular individual" (alteration in original) (citing *E. Enters.*, 524 U.S. at 537)); *Am. Pelagic Fishing Co. v. United States*, 49 Fed. Cl. 36, 51 (2001) (holding that there is no property interest in a fishing permit and stating that "[t]he character of the governmental action here, because that action, in both purpose and effect, was retroactive and targeted at plaintiff, supports the finding of a taking"), *rev'd on other grounds*, 379 F.3d 1363 (Fed. Cir. 2004). See Eagle, *supra* note 2, for further discussion.

130. See *R.I. Econ. Dev. Corp. v. Parking Co.*, 892 A.2d 87, 104 (R.I. 2006) (finding that condemnation of a private parking company's easement intended to benefit revenues of the state airport authority, and was thus not a "public use"); see also Merrill, *supra* note 86, at 667–69 (discussing government actions in enterprise capacity).

131. See *Ark. Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1370 (Fed. Cir. 2013) (noting that "deviations [in water release from government dam] were directed to a single purpose—to accommodate agricultural interests—and had a consistent overall impact on the [claimant's] Management Area").

132. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978).

“Parcel as a whole” is a fetching concept, but is exceedingly difficult and complex to administer in practice.¹³³ As Chief Justice Rehnquist noted, “[t]he need to consider the effect of regulation on some identifiable segment of property makes all important the admittedly difficult task of defining the relevant parcel.”¹³⁴ In that regard, the relevant parcel problem often is referred to as the denominator problem because, in comparing the value that has been taken from the property by the imposition with the value that remains in the property, “one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction.”¹³⁵

The task is made even more difficult by the fact that claimants and the government both have strong incentives to manipulate the relevant parcel. The government asserts, in the coinage of Professor Margaret Radin, that claimants engage in “conceptual severance” by trying to make the relevant parcel, which is the denominator of the takings fraction, appear as small as possible.¹³⁶ On the other hand, “[t]he effect of a taking can obviously be disguised if the property at issue is too broadly defined[,]”¹³⁷ which the current author has referred to as “conceptual agglomeration.”¹³⁸

In determining the relevant parcel, the Federal Circuit has taken “a flexible approach, designed to account for factual nuances.”¹³⁹ The Court of Federal Claims recently presented a step-by-step guide to relevant parcel analysis in *Lost Tree Village Corp. v. United States*.¹⁴⁰ Nonetheless, the concept of the relevant parcel remains fraught with conceptual problems.¹⁴¹

Important problems pertaining to “parcel as a whole” include application of the doctrine to temporary investments,¹⁴² and unproven

133. See generally Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as a Whole*, 36 VT. L. REV. 549 (2012); Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353, 376 (2003).

134. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 514–15 (1987) (Rehnquist, C.J., dissenting) (citing *Penn Cent.*, 438 U.S. at 149 n.13 (Rehnquist, J., dissenting)).

135. *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1380 n.4 (Fed. Cir. 2000) (quoting *DeBenedictis*, 480 U.S. at 497), *aff’d on reh’g*, 231 F.3d 1354 (Fed. Cir. 2000).

136. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1667 (1988).

137. *Ciampitti v. United States*, 22 Cl. Ct. 310, 318–19 (1991).

138. See EAGLE, *supra* note 124, at § 7-7(b)(2).

139. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

140. *Lost Tree Vill. Corp. v. United States*, 100 Fed. Cl. 412, 427–30 (2011) (finding scattered landholdings should not have been included in relevant parcel), *rev’d*, 707 F.3d 1286 (Fed. Cir. 2013).

141. See *infra* Part III.B.

142. See *infra* Part III.B.2.

assertions by government officials that separately deeded parcels are under unified ownership.¹⁴³ When reviewing these problems, it should become clear that the phrase “parcel as whole” has taken on a life of its own. Its role in takings is not merely to define the boundaries of the property subject to the takings inquiry. Rather “relevant parcel” is substantive so that, for instance, there is circularity between investment-backed expectations of the owner of “the” property, and expectations regarding the real estate to be included in the owner’s relevant parcel¹⁴⁴ and non-deeded ownership of the property.¹⁴⁵ Thus, “parcel as whole” interacts with the other *Penn Central* factors to deny compensation in temporary takings. For these reasons, “parcel as a whole” should be considered an additional *Penn Central* factor.

C. *The Recapitulation and Expansion of Penn Central’s Domain*

The Supreme Court’s recapitulation of its regulatory takings analysis in *Lingle v. Chevron U.S.A. Inc.*¹⁴⁶ reiterated the *Penn Central* doctrine, albeit acknowledging that its elements do not comprise an integral whole:

Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner’s right to exclude others *from entering and using* her property—perhaps the most fundamental of all property interests. In the *Lucas* context, of course, the complete elimination of a property’s value is the determinative factor. And the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a

143. See *infra* Part III.B.3.

144. See, e.g., *Dist. Intown Props. Ltd. P’ship v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999) (denying building permits for separately deeded parcels on grounds that owner’s expectation was that they would be used with another parcel).

145. See generally *Eagle*, *supra* note 133, at 579–600 (discussing attempts of California Coastal Commission to assert the doctrine of “unity of ownership,” whereby informal coordination of owners of separately deeded parcels with no overlap of legal ownership would be deemed one parcel for land use regulation purposes).

146. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

regulation's economic impact and the degree to which it interferes with legitimate property interests.¹⁴⁷

Lucas itself referred to "the extraordinary circumstance when no productive or economically beneficial use of land is permitted[.]"¹⁴⁸ However, without explanation, the Supreme Court has alternated between the concepts of "deprivation of use" and "deprivation of value." Indeed, the summation in the preceding paragraph states that "the complete elimination of a property's value is the determinative factor[.]" based on a quotation from *Lucas* referring to a "deprivation of beneficial use."¹⁴⁹ But "value" might be based on the educated guess that a regulation currently prohibiting all "beneficial use" might be abrogated.¹⁵⁰

Furthermore, the *Lingle* summary refers to "exclud[ing] others from entering and using [one's] property—perhaps the most fundamental of all property interests."¹⁵¹ It seems ironic that the Court would thus give credence to the fundamental nature of the use as well as to exclusion, but only in the backhanded manner of describing rights another might take, as opposed to rights the owner possessed. Given that the categorical rule of *Lucas* permits no remaining viable use,¹⁵² and the categorical rule of *Loretto* requires a permanent physical occupation,¹⁵³ almost all property owners who might claim a regulatory taking would have to do so under the *Penn Central* standard.

In the *Penn Central* analysis as summarized in *Lingle*, "economic impact and the degree to which it interferes with legitimate property interests" seem to trump all.¹⁵⁴ "Character" is not even mentioned in *Lingle*, other than as part of the rote *Penn Central* formula. "Legitimate" property interests refer not to assets that might legally be possessed and which belong to the claimant under real property law, but rather to rights that are reasonable "expectations" under what ostensibly is a test of subjective intent.¹⁵⁵ While *Lingle* is a useful summary of the heuristics

147. *Id.* at 539–40 (emphasis added) (citations omitted).

148. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992).

149. *Lingle*, 544 U.S. at 539.

150. *See, e.g., Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893, 903 (Fed. Cir. 1986) (noting that "serious informed bidders" might have been "speculators" who believed they might "mitigate[] the severity of the regulatory action").

151. *Lingle*, 544 U.S. at 539 (emphasis added).

152. *Lucas*, 505 U.S. at 1015 ("[C]ategorical treatment [is] appropriate . . . where regulation denies all economically beneficial or productive use of land." (emphasis added)).

153. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) ("[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.").

154. *Lingle*, 544 U.S. at 540.

155. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

available to courts when reviewing takings claims, it did little to clarify or address the cracks in the *Penn Central* model reviewed in the next section.¹⁵⁶

III. CRACKS IN THE PTOLEMAIC MODEL

This Part of the Article moves from a review of the elements of *Penn Central*¹⁵⁷ to an analysis of the problems that they, and their interactions, create in contemporary regulatory takings law.

A. “Physical” Versus “Regulatory” Takings

1. An Artificial Distinction

In its summary of takings jurisprudence in *Lingle v. Chevron U.S.A., Inc.*,¹⁵⁸ the Supreme Court stated: “The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.”¹⁵⁹ Beyond such appropriations and regulations that deprive owners of “all” economically beneficial use, the *Penn Central* multi-factor test applies.¹⁶⁰ As the Court earlier stated in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*:

The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.¹⁶¹

Tahoe-Sierra and *Lingle* thus make plain that the Court regards a taking as a direct or inverse “physical appropriation,” which it distinguishes from prohibitions on use. According to *Lucas v. South Carolina Coastal Council*, there are several possible purposes for the distinction.¹⁶² One is that “total deprivation of beneficial use is, from the

156. See *infra* Part III.

157. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

158. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

159. *Id.* at 537.

160. *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).

161. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321–22 (2002).

162. *Lucas*, 505 U.S. at 1016–17.

landowner's point of view, the equivalent of a physical appropriation."¹⁶³ The Court quoted Lord Coke as writing: "[F]or what is the land but the profits thereof[?]"¹⁶⁴ Another "functional" basis for the distinction is that governance inherently affects property to some extent and could not function if this required payment. Nonetheless, this basis "does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses."¹⁶⁵

However, as *Lucas* concluded, where no productive use of land is permitted, "it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life[.]'"¹⁶⁶ Also, rules "requiring land to be left substantially in its natural state . . . carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."¹⁶⁷

All of these observations are sensible heuristics, but they are only heuristics. The distinction adds up to the generality that depriving an owner of possession is apt to be a serious deprivation, so it is always a taking, whereas depriving an owner of use is hardly ever that serious, so the owner is left to the *Penn Central* ad hoc test.

While the Supreme Court holds that the government's permanent physical occupation of private property is a taking per se,¹⁶⁸ its view of deprivation of the right to exclude others has been more ambivalent. In *Kaiser Aetna v. United States*,¹⁶⁹ the Court rejected the government's contention that the conversion of a private pond into a marina, and connection of it to a bay, meant that "the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others."¹⁷⁰ However, while the right to exclude might be "one of the most essential sticks," the Court has not regarded its deprivation as a per se taking. In *PruneYard Shopping Center v. Robins*,¹⁷¹ the Court invoked *Armstrong* and *Penn Central* to visualize the facts in quite another way.

163. *Id.* at 1017 (citing *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting)).

164. *Id.* (alterations in original) (quoting 1 E. COKE, INSTITUTES, ch. 1, § 1 (1st Am. ed. 1812)).

165. *Id.* at 1018.

166. *Id.* at 1017 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

167. *Lucas*, 505 U.S. at 1018.

168. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

169. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

170. *Id.* at 176.

171. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

It is true that one of the essential sticks in the bundle of property rights is the right to exclude others. And here there has literally been a “taking” of that right to the extent that the California Supreme Court has interpreted the California State Constitution to entitle its citizens to exercise free expression and petition rights on shopping center property. But it is well established that “not every destruction or injury to property by governmental action has been held to be a ‘taking’ in the constitutional sense.”¹⁷²

PruneYard went on to apply the three *Penn Central* factors and find that “[t]here is nothing to suggest that preventing appellants from prohibiting [free expression by mall visitors and petition signature gatherers] will unreasonably impair the value or use of their property as a shopping center.”¹⁷³

Some theorists, including Professor Adam Mossoff, have challenged the emphasis placed on the right to exclude, preferring instead the owner’s right to use his or her property.¹⁷⁴ As such, Professor Mossoff advocates an “integrated theory of property.” This theory rejects the fragmentation of property rights inherent in the “bundle of sticks” approach and “maintains that the right to exclude is essential to the concept of property, but it is not the only characteristic, nor is it the most fundamental. Other elements of property—acquisition, use, and disposal—are necessary for a sufficient description of this concept.”¹⁷⁵ He further concludes that conceptualizing “property” as a “bundle of sticks” suited the purposes of Progressives “because it made it possible for the modern administrative state to control and restrict various property uses without implicating the constitutional protections of the Takings or Due Process Clauses.”¹⁷⁶

2. Applying the Distinction in Borderline Cases

While the Supreme Court states in *Tahoe-Sierra* that regulatory and physical takings are to be analyzed using different standards,¹⁷⁷ discerning which takings are “regulatory” and which are “physical” involves subtle determinations of the nature of the property involved.

172. *Id.* at 82 (footnote omitted) (citation omitted) (quoting *Armstrong v. United States*, 364 U.S. 40, 48 (1960)).

173. *Id.* at 83.

174. Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 393 (2003).

175. *Id.* at 376.

176. Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. PA. L. REV. 2001, 2007 (2009).

177. *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 323 (2002).

Two recent and important cases highlighting this issue are *Casitas Municipal Water District v. United States*¹⁷⁸ and *Arkansas Game & Fish Commission v. United States*.¹⁷⁹

In *Casitas Municipal Water District*, Casitas operated a water project for the government (“Project”) that included a dam, a water storage facility, and related canals. Its agreement with the government required Casitas to pay for the Project’s construction, and that Casitas “shall have the perpetual right to use all water that becomes available through the construction and operation of the Project.”¹⁸⁰ Subsequently, the government listed the Steelhead Trout as an endangered species and ordered water to be diverted from the Project for use by the trout downstream. Casitas claimed that the diversion of water constituted a physical taking.¹⁸¹ For purposes of summary judgment, the government accepted that the water was Casitas’s property, and challenged only its contention that the diversion was a physical taking. The Court of Federal Claims thereafter held that “the alleged taking was regulatory because it involved the government’s restraint on Casitas’s use of its property rather than the government’s takeover of the property (either by physical invasion or by directing the property’s use to its own needs).”¹⁸²

In 2008, the Federal Circuit reversed the dismissal of the physical takings claim and remanded.¹⁸³ It noted that the government did not block the water at issue from leaving the river to enter the Project, “but instead actively caused the physical diversion of water” from a canal within the Project back to the river, requiring Casitas to build a fish ladder for this purpose, “thus reducing Casitas’s water supply.”¹⁸⁴ The Federal Circuit held that “[t]he government requirement that Casitas build the fish ladder and divert water to it should be analyzed under the physical takings rubric.”¹⁸⁵ It remanded for consideration of other issues, including whether there was a right to divert water from the river under state law, and whether Casitas was in fact deprived of water it actually could use. On remand, the Court of Federal Claims found that California law did not include a property right in diversion, and that

178. *Casitas Mun. Water Dist. v. United States (Casitas IV)*, 708 F.3d 1340 (Fed. Cir. 2013).

179. *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511 (2012).

180. *Casitas IV*, 708 F.3d at 1343.

181. *Id.* at 1344–45.

182. *Id.* at 1346 (citing *Casitas Mun. Water Dist. v. United States (Casitas I)*, 76 Fed. Cl. 100, 105–06 (2007)).

183. *Id.* (citing *Casitas Mun. Water Dist. v. United States (Casitas II)*, 543 F.3d 1276 (Fed. Cir. 2008)).

184. *Id.* (quoting *Casitas II*, 543 F.3d at 1291–92).

185. *Casitas IV*, 708 F.3d at 1346 (alteration in original) (quoting *Casitas II*, 543 F.3d at 1296).

Casitas did not demonstrate any loss of actual beneficial use, so that its claim was not ripe.¹⁸⁶

In its subsequent 2013 decision on appeal, the Federal Circuit rejected Casitas's assertion that the Court of Federal Claims' analysis neglected the Federal Circuit's 2008 finding that there had been a physical taking. The Federal Circuit stated that its earlier ruling was based on the government's temporary concessions for summary judgment purposes and that, "on remand, the Court of Federal Claims was correct to perform a full physical takings analysis, beginning with an assessment of the scope of Casitas's right to the diverted water."¹⁸⁷ On the merits, the opinion continued, Casitas did not have a property interest in the diversion under state law, and "the Court of Federal Claims properly found that the diversion of water down the fish ladder to date has not impinged on Casitas's compensable property interest—the right to beneficial use."¹⁸⁸

Water is a physical substance, but ownership of water not yet impounded typically is expressed in gallons or acre-feet of an implicitly fungible substance. However, the fact that water is not desired for continued possession should not preclude a physical takings claim, because the value of water, like coal, inheres not in the right to exclude others, but in the resource's use. Also, dicta in *Arkansas Game & Fish Commission v. United States*¹⁸⁹ noted the issues of physical versus regulatory takings, and also temporary incursion resulting in permanent damages, suggesting that these issues were amenable to analysis within the *Penn Central* framework.¹⁹⁰

The Supreme Court observed that it has "drawn some bright lines, notably, the rule that a permanent physical occupation of property authorized by government is a taking[.]" but added that most takings claims turn on situation-specific factual inquiries.¹⁹¹ The Court then considered whether temporary flooding can ever give rise to a takings claim.¹⁹² The Court stated that "temporary limitations are subject to a

186. *Id.* at 1347–48 (citing *Casitas Mun. Water Dist. v. United States (Casitas III)*, 102 Fed. Cl. 433, 471–72).

187. *Id.* at 1353.

188. *Id.* at 1360.

189. *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 515 (2012) (holding that government-induced flooding is not barred from constituting compensable taking merely because it was not permanent or inevitably recurring).

190. *Id.* at 518. On remand, the U.S. Court of Appeals for the Federal Circuit used a *Penn Central* analysis to conclude that a taking occurred. See generally *Ark. Game & Fish Comm'n v. United States*, 736 F.3d 1364 (Fed. Cir. 2013).

191. *Ark. Game & Fish*, 133 S. Ct. at 518 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

192. *Id.*

more complex balancing process to determine whether they are a taking[.]” and that this included “flooding cases.”¹⁹³ The discussion noted that the significance of Arkansas water rights law had not been briefed, but that the Federal Circuit might consider it on remand.¹⁹⁴ Also mentioned were the duration of the flooding, whether it was intended or foreseeable, and “the character of the land at issue and the owner’s ‘reasonable investment-backed expectations’ regarding the land’s use.”¹⁹⁵

The expansive dicta in *Arkansas Game & Fish* did not specify whether the repeated incursions of water released by a government dam resulted in a regulatory act that harmed the Commission’s property, an impressment on the property of a temporary flowage easement, or a temporary physical taking of the land. Whichever of these might be the case, there seems a substantial possibility that the Court will approach the issues through the lens of the *Penn Central* ad hoc tests.

If a *Penn Central* test is utilized, the *Loretto* per se test would be limited to *permanent* physical occupations, just as the *Lucas* test has been limited to the deprivation of *all* economically viable use. Accordingly, lesser intrusions would be adjudicated under the *Penn Central* standard.

B. The “Relevant Parcel” Problem

The “parcel as a whole” doctrine¹⁹⁶ is a prime example of *Penn Central* being at war with itself. On the one hand, by its emphasis on “investment-backed expectations,” the doctrine strives for a realistic understanding of what ownership means to the individual claimant. On the other hand, the artificial distinction between physical and regulatory takings, coupled with the Court’s stilted interpretation of temporary takings, augurs against such realism.

The determination of what constitutes the “parcel as a whole” in a given case often is outcome determinative, because regulatory takings law measures the claimant’s loss with respect to the relevant parcel. There is “no bright-line rule” for determining the parcel as a whole, and courts employ “a flexible approach, designed to account for factual

193. *Id.* at 521 (quoting *Loretto*, 458 U.S. at 435 n.12).

194. *Id.* at 522. On remand, the U.S. Court of Appeals for the Federal Circuit refused to consider the Arkansas water rights law issue because the issue was not raised in the trial court. *Ark. Game & Fish*, 736 F.3d at 1375.

195. *Ark. Game & Fish*, 133 S. Ct. at 522 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001)).

196. See *supra* Part II.B.6 for earlier discussion.

nuances.”¹⁹⁷ *Penn Central*’s ideal paradigm for “parcel as a whole” is one deeded parcel with one owner. A court would examine whether the claimant simply had severed some of the physical area of the parcel, and then incorrectly asserted that the economic impact of the regulation should be discerned solely with reference to the severed portion. There are situations, however, where the relevant parcel should be determined to include (or exclude) lands bought or sold at different times or, in effect, impressed with an equitable servitude in favor of other parcels owned by the claimant.¹⁹⁸ Because the claimant’s activity and purpose help shape the relevant parcel against which those factors are to be measured, it is difficult to conceptualize economic impact and expectations as separate factors.

Even where “parcel as a whole” is not an explicit element, such cases are often decided on just that basis. For instance, the Supreme Court has defended the forced renewal of leases pursuant to rent control as not involving occupation of the premises by the government’s designee, but rather as regulation of the terms of the landlord’s agreement with the tenant whose term had expired.¹⁹⁹ Through the alchemy of implicit use of the freehold as the relevant parcel instead of the leasehold, which is bounded by duration, the Court avoids the conflict between its holdings that the government’s physical occupation of a leasehold is compensable,²⁰⁰ whereas the deprivation of all economically viable use for a similar time period is not.²⁰¹

The difficulty with the “parcel as whole” rule harkens back to the basic problem raised by this Article: the *Penn Central* factors are not only internally vague, but each factor also derives its meaning and content through its interaction with the other factors. “Parcel as a whole” is no different, and for this reason should be considered as an additional factor in *Penn Central* analysis. The incoherence resulting from this newly minted four-factor test can be analogized to that of a soccer field that changes in size according to the strategy of the players, and where referees apply flexible rules that contract or expand the field, depending on the factual nuances of the latest play.

197. *Lost Tree Vill. Corp. v. United States*, 100 Fed. Cl. 412, 427 (2011) (quoting *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994)), *rev’d on other grounds*, 707 F.3d 1286 (Fed. Cir. 2013).

198. *See Lost Tree Vill. Corp.*, 100 Fed. Cl. at 427–30 (finding that scattered holdings should not have been included in relevant parcel). *See generally* Merriam, *supra* note 133.

199. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 529–31 (1992).

200. *E.g., Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945).

201. *E.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002).

1. Identifying the Property Interest

Even apart from efforts by the takings claimant to reduce the relevant parcel and the government to expand it, there are basic problems in determining the specific property interest for which the claimant seeks to recover.

For instance, in *Horne v. Department of Agriculture*,²⁰² the underlying substantive questions included whether the relevant property was the cash demanded as fines for not turning over raisins to a marketing board pursuant to the USDA's "Raisin Marketing Order"; the raisins themselves, which comprised approximately half of the claimant's total crop; or the total crop itself. The Supreme Court ultimately held that the Hornes could raise an equitable takings defense against the assessment of fines.²⁰³ However, given the administrative judge's finding that "'handlers no longer have a property right that permits them to market their crop free of regulatory control[,]'"²⁰⁴ it is uncertain how the relevant property interest will be characterized on remand.

Complicating matters, the purpose of the Raisin Marketing Order, which is administered by a committee of raisin growers, is to raise the price of raisins above the free market price that growers would obtain if unlimited raisins could be sold. If the aggregate revenue obtained from the restricted crop is greater than the revenue that would be obtained for the unrestricted crop, might individual restricted growers obtain implicit compensation through reciprocity of advantage?²⁰⁵

2. The Temporary Investment

While the Supreme Court's *Penn Central* doctrine places a substantial focus on a property owner's investment-backed expectations,²⁰⁶ those who make investments of limited duration may find that the doctrine has morphed to their substantial detriment under the Court's incantations that courts make takings determinations with reference to the "parcel as a whole." However, this formulation disregards the interests of those who purchase property for use during a

202. *Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2063 (2013) (holding that a defendant may raise the Takings Clause as a defense to a direct transfer of funds mandated by the Government and that the Ninth Circuit had jurisdiction over petitioner's takings claim).

203. *Id.* at 2061.

204. *Id.* at 2059 (citation omitted).

205. *See, e.g., Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (noting that competitors bound by the same restriction can enjoy an "average reciprocity of advantage").

206. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

limited time frame.²⁰⁷ It also impares the interests of investors, for whom the economic viability of a short-term investment is frustrated when the returns from that investment are less than the opportunity costs of making it, taking into account both the opportunity costs of capital and the cash flow returns to the owner's equity, as evaluated using an appropriate financial benchmark.²⁰⁸

In *Lucas v. South Carolina Coastal Council*,²⁰⁹ the Court held that a deprivation of "all economically viable use" would constitute a per se taking. In several earlier cases, it held that the U.S. government's commandeering of private facilities for its own use during World War II would constitute takings of leasehold interests.²¹⁰ Putting these concepts together, a regulation resulting in deprivation of "all economically viable use" for a substantial period of time would logically be analogous to the condemnation of a leasehold interest.

The Supreme Court rejected that view in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,²¹¹ where the petitioners much earlier had purchased land in the foothills overlooking Lake Tahoe for use as retirement homes. Justice Stevens, writing for the majority, applied the "parcel as whole" test to hold that a purportedly complete deprivation for a period of time could not be a per se taking. Because the moratoria effectively prohibiting use were temporary, Justice Stevens reasoned, there would remain residual value in the fee simple.²¹² The temporary interest should not be "sliced" away from it.²¹³

But, the ubiquitous leasehold has for centuries been carved from the fee simple interest.²¹⁴ As Chief Justice Rehnquist noted in dissent, the majority in *Tahoe-Sierra* disregarded "th[e] 'practical equivalence' between respondent's deprivation and the deprivation resulting from a leasehold."²¹⁵ Justice Stevens fended off the notion of regulatory

207. See *infra* notes 211–16 and accompanying text.

208. See *infra* notes 217–28 and accompanying text; see also William W. Wade, *Sources of Regulatory Takings Economic Confusion Subsequent to Penn Central*, 41 ENVTL. L. REP. 10936, 10940 (2011).

209. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992).

210. See *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945).

211. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 335 (2002).

212. *Id.* at 332 (asserting that "[l]ogically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted").

213. *Id.* at 319 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 774 (9th Cir. 2000)) (discussing the holding of the Court of Appeals).

214. See *id.* at 331.

215. *Id.* at 349 (Rehnquist, C.J., dissenting).

leaseholds by citing what he termed the “longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, [which] makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking[.]’”²¹⁶

The impact of this reasoning has made it almost impossible for claimants to recover even for very heavy losses sustained with regard to temporary investment property. A vivid example of this is *CCA Associates v. United States*,²¹⁷ where the Federal Circuit acknowledged its earlier repudiation of its “return on equity” approach,²¹⁸ and measured the diminution in the return resulting from federal statutes not over the additional time that the claimant was forced to maintain its investment in low-income housing, but rather over the much longer life of the building in which the investment was made.²¹⁹

CCA had entered into an agreement with the federal government to construct multifamily housing, which it was obligated to rent to low- and moderate-income tenants for a period of 20 years. Thereafter, CCA could leave the program and relet the apartments to market-rate tenants. When the 20 years were up, new federal Housing Preservation Acts required CCA to accept below-market rents for an additional five years.²²⁰

In *CCA Associates*, had the Federal Circuit used the return-on-equity approach that it adopted in 2003 in *Cienega VIII*,²²¹ there would have been an 81 percent diminution in returns, which would suggest a *Penn Central* taking. Using the Federal Circuit’s replacement 2007 *Cienega X* approach,²²² the economic impact was reduced to a non-consequential 18 percent. In *Cienega VIII*, the Federal Circuit focused on the “total and immediate” impact of the Preservation Statutes,²²³ whereas in *Cienega X*, which *CCA Associates* was bound to apply, the Federal Circuit ignored the distinction between a categorical *Lucas*

216. *Tahoe-Sierra Pres. Council*, 535 U.S. at 323 (majority opinion).

217. *CCA Assocs. v. United States*, 667 F.3d 1239 (Fed. Cir. 2011).

218. *Cienega Gardens v. United States (Cienega X)*, 503 F.3d 1266, 1280 (Fed. Cir. 2007).

219. For a detailed discussion, see Eagle, *supra* note 102, at 425–35.

220. Emergency Low Income Housing Preservation Act (ELIHPA) of 1987, Pub. L. No. 100-242, 101 Stat. 1877 (1988) (codified as amended at 12 U.S.C. § 17151 (2012)); Low-Income Housing Preservation and Resident Homeownership Act (LIHPRA) of 1990, Pub. L. No. 101-625, 104 Stat. 4249 (codified as amended at 12 U.S.C. §§ 4101–4147 (2012)).

221. *Cienega Gardens v. United States (Cienega VIII)*, 331 F.3d 1319, 1344 (Fed. Cir. 2003).

222. *Cienega X*, 503 F.3d at 1266.

223. *Cienega VIII*, 331 F.3d at 1344.

taking and a partial *Penn Central* taking, stating that “[i]n *Tahoe-Sierra*, the necessity of considering the overall value of the property was explicitly confirmed in the temporary regulatory takings context.”²²⁴ Thus, while not formally repudiating the theory that there can be a temporary regulatory taking under the *Penn Central* ad hoc balancing tests, the practical effect of the abrogation of the return-on-equity approach is to conflate the requirements of a temporary regulatory taking with those of a permanent regulatory taking.

The failure of the Federal Circuit to ensure that property owners receive a reasonable return on their investments is reminiscent of the fate of the California *Birkenfeld* doctrine. In *Birkenfeld v. City of Berkeley*,²²⁵ the California Supreme Court declared that the rent limitation provisions of the Berkeley ordinance would be “within the police power if they [were] reasonably calculated to eliminate excessive rents and *at the same time provide landlords with a just and reasonable return on their property*.”²²⁶ The court proceeded to invalidate the ordinance on the grounds that it did not, on its face, guarantee the landlord a reasonable return.

However, the two crucial elements in determining a “fair rate of return,” income and capital, are defined in terms of each other. The market value of rental property is a function of income that the property is expected to generate, but what is a “reasonable” return to capital depends on market value. Also, a reasonable return depends on the market price of the building and mortgage interest rates at the time the landlord purchased it. The California Supreme Court’s response to these imperatives in *Fisher v. City of Berkeley*²²⁷ was to state that neither the California State Constitution nor the U.S. Constitution required that “reasonable” return be set with regard to any “specific standard.”²²⁸

By conflating temporary and permanent regulatory takings in *Tahoe-Sierra*,²²⁹ thus leading to the Federal Circuit’s holdings in *Cienega X* and *CCA Associates*; and by affirming the dismantlement of any objective standard for a reasonable return on investment in *Fisher*, the Supreme Court has further retreated both from protection of traditional property rights,²³⁰ and from its articulated goal of furthering owners’ investment-backed expectations in *Penn Central*.

224. *Cienega X*, 503 F.3d at 1281.

225. *Birkenfeld v. Berkeley*, 550 P.2d 1001 (Cal. 1976).

226. *Id.* at 1027 (emphasis added).

227. *Fisher v. City of Berkeley*, 693 P.2d 261 (Cal. 1984), *aff’d*, 475 U.S. 260 (1986).

228. *Id.* at 261.

229. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002).

230. Traditional property rights include: the right to exclude others, see generally Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998); the

3. On Proving Non-Ownership

For purposes of determining the “parcel as a whole,” “most courts entertain at least a strong presumption that all contiguous land held by a single owner is to be treated as a single parcel.”²³¹ Where parcels have different legal owners, the attribution of ownership to other entities depends on a showing of “clear and convincing proof.”²³² While different owners could appropriate their property to a joint business venture, this too must be established by proof.²³³

In an effort to circumvent the need for proof of joint ownership where there is some indication of development coordination and joint infrastructure among neighboring owners, the California Coastal Commission has developed a theory of “unity of ownership.”²³⁴ As discussed in detail elsewhere,²³⁵ judicial approval of the theory would permit the Commission to treat separately deeded residential parcels as one parcel, based on inferences from the facts that the individual parcels’ different owners of record tried to achieve architectural harmony, share expenses of infrastructure development, socialize as friends, and employ the same counsel. This is also the case where the Commission believes it has inferential evidence that they are venturers in a common development scheme.

In cases now pending,²³⁶ the Commission asserts that five large residential lots overlooking the Pacific Ocean in Malibu should be treated as one, with the construction of only one house to be permitted in total. Only one published decision even suggests the viability of this

right of use, see generally Mossoff, *supra* note 174; and the right to transfer one’s rights, see *Hodel v. Irving*, 481 U.S. 704, 716–17 (1987) (declaring that “the right to pass on property . . . has been part of the Anglo-American legal system since feudal times”).

231. Eagle, *supra* note 133, at 570 (citing John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1031 (2003) (citing, for example,, *Dist. Intown Props. Ltd. P’ship v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999); *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999))).

232. See, e.g., CAL. EVID. CODE § 662 (West, Westlaw current through 2013 Reg. Sess.) (“The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.”).

233. See, e.g., *Zanetti v. Zanetti*, 175 P.2d 603, 605 (Cal. Dist. Ct. App. 1947) (noting that expenses were paid out of a common account).

234. CAL. COASTAL COMM’N, STAFF REPORT: REGULAR CALENDAR 81–82 (2010), available at <http://documents.coastal.ca.gov/reports/2011/2/Th8a-s-2-2011.pdf> (asserting theory’s legality and necessity).

235. Eagle, *supra* note 133, at 579–600.

236. See *Mulryan Props., LLLP v. Cal. Coastal Comm’n*, No. BS133269 (Cal. Super. Ct., L.A. Cnty. Oct. 21, 2011) (consolidating case with those brought by neighboring owners).

interpretation.²³⁷ There, the city was provided an opportunity to present evidence supporting its assertion that a mid-litigation parcel transfer was accomplished for the purpose of creating an advantageous denominator.²³⁸

California law provides that the owner of “legal title” is presumed to be the owner of full “beneficial title” unless there is “clear and convincing evidence” to the contrary.²³⁹ However, while that provision is applicable to judicial determinations, it is not applicable to administrative determinations. Courts afford a strong presumption of correctness concerning administrative findings,²⁴⁰ and discern whether they are supported by “substantial evidence.”²⁴¹ A bill was introduced in the California legislature to apply the “clear and convincing evidence” standard to administrative determinations, but it was defeated in committee.²⁴² The Coastal Commission successfully opposed the legislation, asserting that “the new, higher standard would have a chilling effect on the state’s ability to effectively carry out statutory land use planning activities[.]”²⁴³ The result is that owners challenging adverse administrative determinations have the burden of proving a negative—that their legally separate parcels are not one “parcel as a whole.”²⁴⁴

C. “Permanent” and “Temporary” Regulatory Takings

The relationship between “permanent” and “temporary” physical takings is clear in large part, although a “permanent” taking is not necessarily really permanent,²⁴⁵ and a “temporary” taking might instead be classified as a *de minimis* or tortious incursion.²⁴⁶

237. See *City of Coeur d’Alene v. Simpson*, 136 P.3d 310 (Idaho 2006). The court noted that it was “not pure fantasy” to imagine a surreptitious ownership agreement. *Id.* at 320.

238. *Id.* at 320.

239. CAL. EVID. CODE § 662 (West, Westlaw current through 2013 Reg. Sess.).

240. *Fukuda v. City of Angels*, 977 P.2d 693, 704 (Cal. 1999).

241. See, e.g., *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 764 P.2d 278, 283 (Cal. 1988).

242. A.B. 2226, 2011 Leg., Reg. Sess. (Cal. 2012).

243. S. JUDICIARY COMM. REP., 2011 Leg., A.B. 2226, at 5 (Cal. 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_2201-2250/ab_2226_cfa_20120618_162746_sen_comm.html.

244. See, e.g., *Fukuda*, 977 P.2d at 700. “In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.” *Id.*

245. See *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991) (“[P]ermanent’ does not mean forever, or anything like it.”).

246. *Id.* at 1377.

In his dissent in *Tahoe-Sierra*,²⁴⁷ Chief Justice Rehnquist noted that in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* the Court “reject[ed] any distinction between temporary and permanent takings when a landowner is deprived of all economically beneficial use of his land.”²⁴⁸ He added:

[F]undamentally, even if a practical distinction between temporary and permanent deprivations were plausible, to treat the two differently in terms of takings law would be at odds with the justification for the *Lucas* rule. The *Lucas* rule is derived from the fact that a “total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.” The regulation in *Lucas* was the “practical equivalence” of a long-term physical appropriation, i.e., a condemnation, so the Fifth Amendment required compensation. The “practical equivalence,” from the landowner’s point of view, of a “temporary” ban on all economic use is a forced leasehold.²⁴⁹

However, the majority held that the “longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking,’ and vice versa.”²⁵⁰ Unlike “relatively rare” physical takings, which “usually represent a greater affront to individual property rights[,]” regulations of land use are both “ubiquitous” and often “tangential” to value, and, if payment in return was always required, government land use regulation would be a “luxury.”²⁵¹

These heuristics might be correct in the general run of cases. They do not, however, get to the essence of Chief Justice Rehnquist’s point that if physical takings cause such severe loss as to be deemed compensable even if temporary, so should regulatory losses that are severe enough to be the “practical equivalence” of physical takings even if temporary.

247. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 343 (2002) (Rehnquist, C.J., dissenting).

248. *Id.* at 347 (citing *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 318 (1987)).

249. *Id.* at 348 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992)).

250. *Id.* at 323 (majority opinion) (footnote omitted).

251. *Id.* at 323–24.

1. Might a "Permanent" Taking Be Temporary?

An important consideration in the *Tahoe-Sierra* majority's response to Chief Justice Rehnquist is that the Court's seminal temporary regulatory takings case, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,²⁵² was not about a regulation intended to be temporary at all.

When the Court in *First English* "turn[ed] to the question whether the Just Compensation Clause requires the government to pay for 'temporary' regulatory takings[.]"²⁵³ we should note that it placed the word "temporary" in quotes. The regulations at issue were intended as permanent regulations, and their status changed only after the determination that they would constitute takings. "Once a court determines that a taking has occurred," the Court in *First English* added, "the government retains the whole range of options already available—amendment of the regulation, *withdrawal of the invalidated regulation*, or exercise of eminent domain."²⁵⁴ The Court "merely" held that there was an obligation to pay just compensation "for the period during which the taking was effective."²⁵⁵

The phrase "withdrawal of the invalidated regulation" seems both illogical and presumptuous. It is illogical because a government mandate subsequently determined to require just compensation does not thereby "violate" the Takings Clause. It is expected that government acts intended to further the public good might require just compensation,²⁵⁶ and any ensuing violation of the constitutional right would result not from the regulation, but from a refusal to pay.

The analysis is presumptuous because it assumes that a subsequent legislative "withdrawal" is effective from the time of the repeal, albeit, under *First English*, not from the date of the initial enactment that constituted the taking. If the government had condemned a house to use the land in a highway project, and several years later had decided to abandon the project, could it then force the buyer to reassume ownership? If the answer is "no," would the same answer not be required where the regulation worked a "total deprivation of beneficial use" that made it the "practical equivalence" of a physical taking? This author has suggested elsewhere that a government inchoate right to

252. *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304 (1987).

253. *Id.* at 313.

254. *Id.* at 321 (emphasis added).

255. *Id.*

256. *See E. Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part) (noting the presumption that government activity constituting a taking otherwise is constitutional).

“withdraw,” like the one that worked the *Lucas*-type taking, would be the equivalent of the government having taken a separate “put option” that would force the claimant to reassume ownership under the status quo ante.²⁵⁷

2. Evaluating the Temporary Taking as Permanent

In *Tahoe-Sierra*, the Supreme Court held that it was “inappropriate” to treat physical takings cases as “controlling precedents” for regulatory takings, and vice versa.²⁵⁸ Justice Stevens noted that *Penn Central* made “clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on ‘the parcel as a whole[.]’”²⁵⁹

Both [geographic and temporal] dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner’s use of the entire area is a taking of “the parcel as a whole,” whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.²⁶⁰

This analysis is economically uninformed because property does not “recover value” when a restriction is removed. Taken literally, an asset might have the same nominal value at some point in the future as it had in the past. However, it does not have the same actual value because the asset’s value in the past would have generated earnings during the period of the restriction. A true comparison of the value of two assets would have to be made at the same point in time. The usual way this is done is through present value analysis, whereby all items of income and expenditure are taken into account, each item discounted by an appropriate discount rate that takes into account the earnings potential of the sum if invested.²⁶¹

Justice Stevens is correct to the extent that if government restricts the commencement of economically viable use to the future, the asset has some value now. That value is the smaller sum that hypothetically could

257. See Steven J. Eagle, *Just Compensation for Permanent Takings of Temporal Interests*, 10 FED. CIR. B.J. 485, 509 (2001).

258. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 323 (2002).

259. *Id.* at 326–27 (discussing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978)).

260. *Id.* at 331.

261. See Wade, *supra* note 208, at 10945.

have been invested now at an anticipated rate of return, so that the present sum, together with compounded earnings, would equal the market value of the assets when its viable economic use begins. A good way to measure the economic impact of the temporary restriction would be to determine the fair market value of the unrestricted asset now, less the current fair market value of the asset subject to the restriction.²⁶²

The effect of this conflation is to vitiate the concept of a “temporary” regulatory taking, in the sense that the extremely sharp or total deprivation that the owner must endure at present and in the near future is treated as if it were averaged over a much longer time frame. The result is that temporary regulatory deprivations are treated as if they were much milder permanent deprivations.

In the case where the owner’s investment model is based only on use of the asset for a limited period of time, the loss can be profound.²⁶³ Where a takings claimant plans long-term ownership, his or her loss likely will be sufficiently attenuated such that the *Penn Central* “economic impact” factor does not augur for a regulatory taking.

In *Arkansas Game & Fish Commission v. United States*,²⁶⁴ for example, the Supreme Court held only that government-induced flooding was not barred from constituting a compensable taking merely because it was not permanent or inevitably recurring.²⁶⁵ However, it left for remand possible consideration of issues of permanent and temporary takings, discussed here, and physical and regulatory takings, discussed elsewhere in the Article.²⁶⁶

Arkansas Game & Fish noted that, in *Loretto v. Teleprompter Manhattan CATV Corp.*,²⁶⁷ the Court “distinguished permanent physical occupations from temporary invasions of property, expressly including flooding cases, and said that ‘temporary limitations are subject to a more complex balancing process to determine whether they are a taking.’”²⁶⁸ The Court of Federal Claims stated in *Arkansas Game & Fish* that it would:

[A]ssess the government’s acquisition of the flowage easement as a predicate closely attendant to the Commission’s property interest in timber. *In effect, the temporary taking of a flowage easement resulted in a permanent taking of timber* and thus timber value serves

262. See generally *Eagle*, *supra* note 102.

263. See discussion *supra* Part III.B.2.

264. *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511 (2012).

265. See discussion *supra* Part III.A.2.

266. See discussion *supra* Part III.A.2.

267. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

268. *Ark. Game & Fish*, 133 S. Ct. at 521 (quoting *Loretto*, 458 U.S. at 435 n.12).

best as the measure of monetary relief to which the Commission is entitled.²⁶⁹

Presumably, the words “in effect” negate any implication that the timber itself had been taken.²⁷⁰ An assertion to the contrary would be problematic under the “parcel as a whole” requirement because the Management Area contained unaffected timber and had other uses that were undamaged.²⁷¹ Also, in no sense did the government appropriate the timber to meet its needs, as it might be said to appropriate the flowage easement, an interest in real property, to effectuate a release for the surplus water behind its dam.

That said, the categorical exception from application of the *Penn Central* multifactor test promulgated in *Loretto* did not explicitly encompass government incursions beyond “permanent physical occupations.”²⁷² Were the Court to treat losses such as those in *Arkansas Game & Fish* as resulting from a temporary physical incursion, then the government might successfully assert that the temporary flowage easement itself would have to be evaluated under *Tahoe-Sierra*.²⁷³ As a consequence, the damage to the Commission’s Management Area would have to be evaluated in relation to value that would be generated during the Area’s indefinite lifetime. This would indicate that the takings fraction would be small indeed, and that the chances for success under a *Penn Central* claim would be correspondingly unlikely.

In the Supreme Court’s *Arkansas Game & Fish* opinion,²⁷⁴ it referred to its holding in *Loretto v. Teleprompter Manhattan CATV Corp.* that permanent physical invasions are categorical takings, whereas “temporary limitations are subject to a more complex balancing process to determine whether they are a taking.”²⁷⁵ *Loretto* discussed *Penn Central*, which “contains one of the most complete discussions of the Takings Clause[,]” as setting forth “factors that a court might ordinarily examine” in analyzing a non-permanent physical incursion.²⁷⁶

269. *Ark. Game & Fish Comm’n. v. United States*, 87 Fed. Cl. 594, 624–25 (2009) (emphasis added), *rev’d*, 637 F.3d 1366 (Fed. Cir. 2011), *rev’d and remanded*, 133 S. Ct. 511 (2012).

270. On remand from the Supreme Court, the Federal Circuit affirmed “the trial court’s legal conclusion that the deviations caused an invasion, in the form of a temporary flowage easement, of the property rights enjoyed by the Commission[.]” *Ark. Game & Fish Comm’n. v. United States*, 736 F.3d 1364, 1372 (Fed. Cir. 2013).

271. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

272. *Loretto*, 458 U.S. at 435.

273. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002).

274. *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511 (2012).

275. *Id.* at 521 (quoting *Loretto*, 458 U.S. at 435 n.12).

276. *Loretto*, 458 U.S. at 432 (discussing *Penn Cent.*, 438 U.S. 104).

Notably, neither the Supreme Court's *Arkansas Game & Fish* opinion, nor opinion of the Federal Circuit on remand,²⁷⁷ mentioned *Penn Central*. Neither did the Federal Circuit utilize the rule it developed in *Cienega X*²⁷⁸ for the purpose of comparing the economic burden of the regulation during the temporal period during which it was in effect with the value of the fee simple in order to determine the takings fraction²⁷⁹ that would help explicate whether there indeed was a taking under the *Penn Central* doctrine.

IV. CONCLUSION

The *Tahoe-Sierra*²⁸⁰ majority recognized the Supreme Court's decades-long practice of "resist[ing] the temptation to adopt per se rules in our cases involving partial regulatory takings, preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula."²⁸¹ Quoting Justice O'Connor's concurring opinion in *Palazzolo v. Rhode Island*,²⁸² the Court added that "[t]he Takings Clause requires careful examination and weighing of all the relevant circumstances in this context."²⁸³ This instruction indicates that the Court's ad hoc *Penn Central* test includes a number of factors, perhaps not limited to the three enumerated as being of "particular significance,"²⁸⁴ and all of the circumstances that are relevant with respect to those factors.

While it would be unreasonable to expect that such an unbounded array of factors and myriad of circumstances could lend themselves to a mathematical formula both "simple" and "precise," Justice O'Connor's *Palazzolo* concurrence severely understated the problem. The Court has not provided even general guidance on how to weigh the various factors. The problem is that "the Court has done little to clarify its ad hoc, multifactor approach since *Penn Central*[,]""²⁸⁵ and certainly has not

277. *Ark. Game & Fish Comm'n v. United States*, 736 F.3d 1364 (Fed. Cir. 2013).

278. *Cienega X*, 503 F.3d 1266 (Fed. Cir. 2007). For discussion, see *supra* notes 217–30 and accompanying text.

279. See *supra* notes 136–38 and accompanying text.

280. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

281. *Id.* at 326 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633–34 (2001) (O'Connor, J., concurring)).

282. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

283. *Tahoe-Sierra*, at 326 n.23 (quoting *id.* at 636 (O'Connor, J., concurring)).

284. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (discussing "economic impact," "investment-backed expectations," and the "character of the regulation").

285. David Crump, *Takings by Regulation: How Should Courts Weigh the Balancing Factors?*, 52 SANTA CLARA L. REV. 1, 2 (2012).

furnished judges, litigants, or scholars with guides to application that are neither mechanical formulae nor unhelpful generalities.

Although the *Penn Central* doctrine's economic impact and expectations tests refer to the claimant, they are unresponsive to the practical concerns of property owners. They disregard the fact that owners of undeveloped property both change and sharpen expectations about eventual development over time, and that economically "viable" use depends on their purchase price and also upon mortgage servicing obligations that the owner incurred. They also disregard the fact that some owners have structured their investments on short-term ownership of long-lived assets.²⁸⁶

Judicial subordination of owners' use rights in favor of rights of exclusion²⁸⁷ leads to inordinate emphasis on whether a regulatory taking approaches the "equivalent of a physical appropriation."²⁸⁸ Similarly, the parcel as whole factor overly emphasizes strategic gamesmanship on behalf of claimants and government actors, raising the stakes for theories based on conceptual severance and agglomeration. Instead of relying on traditional rules of partnership and ownership, the parcel as a whole flexible approach incorporates *Penn Central*'s other factors, layering the doctrine in complexity, redundancy, and incoherence.

One element of the *Penn Central* doctrine that warrants substantial emphasis is the aspect of the "character of the regulation" test that stresses whether the owner is targeted for disadvantageous treatment. This approach was raised by the Court of Federal Claims in *American Pelagic Fishing Co. v. United States*,²⁸⁹ and by the Federal Circuit in *CCA Associates v. United States*.²⁹⁰ This inquiry has the merit of most closely resembling the concern in *Armstrong v. United States* that Justice Brennan professed motivated *Penn Central*: "the 'Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"²⁹¹

286. See *supra* Part III.B.2 for discussion of regulatory takings and temporary investments.

287. See *supra* notes 174–76 and accompanying text.

288. *Lucas v. S.C. Coastal Council*, 505 U.S. 1013, 1017 (1992) (citing *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting)).

289. *Am. Pelagic Fishing Co. v. United States*, 49 Fed. Cl. 36, 50–51 (2001) (holding that the character of a regulation effectively and retroactively targeting a particular fishing vessel for revocation of fishing rights supported the conclusion that there was a taking), *rev'd*, 379 F.3d 1363 (Fed. Cir. 2004) (holding that there is no property interest in a fishing permit).

290. *CCA Assocs. v. United States*, 667 F.3d 1239 (Fed. Cir. 2011).

291. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978) (alteration in original) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

In both its temporal and spatial dimensions, the interaction of the Supreme Court's "parcel as a whole" rule with the other *Penn Central* factors has exacerbated the incoherence of the Court's regulatory takings doctrine.